IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33372

STATE OF IDAHO,	)	**2008 Unpublished Opinion No. 636**
	)	
Plaintiff-Respondent,	)	**Filed: September 9, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
JOSIAH RAIN JONES,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Latah County. Hon. John H. Bradbury, District Judge.

Judgment of conviction for aggravated battery, affirmed.

Todd S. Richardson, Clarkston, Washington, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Josiah Rain Jones appeals from his judgment of conviction for aggravated battery. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

In July 2005, Jones was visiting his girlfriend Mandy--the victim's ex-wife[1]--and her young daughter at Mandy's coffee shop. Mandy's coffee shop is connected to a bar. While Jones was present, Eric Cutlip, the victim and Mandy's ex-husband, entered the coffee shop and confronted Mandy about their custody arrangement. Jones punched Cutlip, knocking him down. Mandy retreated into the bar with her daughter, and Cutlip attempted to follow them. Jones

[1] Although we refer to Mandy as victim's ex-wife, it is not clear from the record whether the divorce decree had been entered by the date the incident giving rise to this case occurred.

punched Cutlip again, knocking him to the ground. It was later determined that Jones had fractured both of Cutlip's cheek bones.

Jones was charged with aggravated battery. A three-day jury trial was conducted. Jones testified and admitted to punching Cutlip twice but asserted that the amount of force he used was reasonable. Jones argued, and the jury was instructed on, the affirmative defense of the defense of others, asserting that he was justified in punching Cutlip in order to protect Mandy and her daughter. The jury found Jones guilty of aggravated battery. I.C. §§ 18-903, 18-907, 18-908. Jones appeals.

II.

ANALYSIS

A. Closing Argument and the Curative Instruction

Jones asserts the district court improperly refused to allow him to argue regarding the reasonable doubt standard during closing argument. Specifically, Jones alleges the district court erred in restricting him "from making arguments and discussing the law which was set forth in the jury instructions." *See State v. Beebe*, 145 Idaho 570, 576, 181 P.3d 496, 502 (Ct. App. 2007) (holding that "closing argument is an opportunity for the parties to . . . discuss the law set forth in the jury instructions as it applies to the trial evidence").

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Id.*; *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Phillips*, 144 Idaho at 86, 156 P.3d at 587.

In 1979, the Idaho Supreme Court concluded that, in a case where the evidence against the defendant was entirely circumstantial, the trial court erred in refusing to give defendant's requested jury instruction discussing circumstantial evidence and reasonable doubt. *See State v. Holder*, 100 Idaho 129, 132-33, 594 P.2d 639, 642-43 (1979). In that case, the defendant requested the following jury instruction:

> You are not permitted to find the defendant guilty of the crime charged against him based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt has been proved beyond a reasonable doubt.
>
> Also, if the evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, it is your duty to adopt that interpretation which points to the defendant's innocence, and reject the other which points to his guilt.

Id. at 132, 594 P.2d at 642. For approximately twenty years, the requested jury instruction in *Holder* was considered a proper statement of the law, and it was error for a district court to refuse to give the *Holder* instruction if the case against a defendant was based entirely on circumstantial evidence.

In 2000, the Supreme Court reexamined the *Holder* instruction to determine whether it had continued validity. *See State v. Humphreys,* 134 Idaho 657, 8 P.3d 652 (2000). The Court relied on precedent from several sister states and a United States Supreme Court case discussing a growing consensus in the legal field that circumstantial evidence was not inherently less reliable than direct evidence. The Court concluded that it was no longer appropriate to give the *Holder* instruction and that "in all criminal cases there should be only one standard of proof, which is beyond a reasonable doubt." *Humphreys,* 134 Idaho at 661, 8 P.3d at 656.

In *Humphreys,* the Court relied, in part, on *Holland v. United States,* 348 U.S. 121 (1954). The defendant in *Holland* requested an instruction that provided that "where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt." *Id.* at 139. The *Holland* Court recognized that there was support for this type of a circumstantial evidence instruction in lower court decisions, but it concluded that "the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." *Id.* at 139-40.

In this case, Jones began to argue the premise set forth in the *Holder* instruction. During closing argument, Jones asserted:

> Remember we talked a little bit about how do you overcome that initial little bias, because as jurors you have a duty to presume him innocent until proven guilty beyond that mouse hole, that reasonable doubt.

> Well, let me suggest one thing for you. Anytime there is evidence that can be thought of in more than one way, any time you look at this and say I think it went that way, if there is an explanation for that evidence that would lead you to a not guilty--

The state objected and the district court sustained the objection.

On appeal, Jones asserts that it was improper for the district court to preclude him from arguing the legal principle contained in the *Holder* instruction because there is a significant difference between an instruction and argument and because the Idaho appellate courts have never concluded the *Holder* principle to be an incorrect statement of law. The *Holder* instruction--and therefore the legal principle contained within that instruction--was only approved for use in cases where the evidence against a defendant was entirely circumstantial.

In this case, there was direct evidence provided through testimony by both Jones and Cutlip that Jones hit Cutlip at least twice. Furthermore, contrary to Jones's assertion on appeal, the closing argument he was presenting to the jury was not discussing the law set forth in the jury instructions because there was no *Holder* instruction given. We conclude the district court did not err in refusing to allow Jones to argue the *Holder* principle during closing argument.

Next, Jones asserts that the district court's error in precluding him from arguing the *Holder* principle was compounded by the court's curative instruction. Jones contends that the curative instruction informed the jury to completely disregard his counsel's argument and tacitly directed the jury to find him guilty. Jones relies on the proposition that "a judge's remark will be deemed prejudicial if it constitutes a comment on the weight of the evidence or indicates an opinion of the court as to the defendant's guilt or innocence." *State v. Johnson*, 138 Idaho 103, 106, 57 P.3d 814, 817 (Ct. App. 2002). The state responds that Jones's contention is unsupported by the record.

After determining that Jones would not be allowed to argue the *Holder* principle, the district court informed the jury as follows:

> Be seated, please. Ladies and gentlemen, I really am sorry to interrupt the rhythm of it to decide but it's an important issue. And please don't judge either side by this because the Supreme Court has had a tough time--Idaho Supreme Court has had a tough time making up its mind on what the law should be in this particular area. So, it certainly was reasonable for either of them to argue as they have. And I've made my decision. *I'm going to ask you to disregard [defense counsel's] statements that it could go one way or the other, that you had--that you should find not guilty.* I'm not saying--so, I'm asking you just simply to disregard

> that portion of the argument and that will--I have concluded that that would apply only where there's a case where it's circumstantial evidence rather than where there's direct evidence.

(Emphasis added). Relying on the italicized portion of the district court's curative instruction, Jones argues that the instruction was an impermissible comment on the evidence, informed the jury to disregard his arguments entirely, and deprived him of the right to a fair trial.

Contrary to Jones's argument, we do not agree that the curative instruction informed the jury to disregard Jones's argument entirely. The curative instruction specifically informed the jury to disregard "that portion of the argument" in reference to Jones's attempt to argue the *Holder* principle. We also disagree that the instruction was an impermissible comment on the evidence. Nowhere in the instruction does the district court refer to the evidence. The instruction informs the jury to disregard Jones's statement that, if there is evidence going one way or the other, the jury must find Jones not guilty.

As the state concedes, the district court's instruction was "perhaps not the utmost in precision." However, a defendant is entitled to a fair trial, but not a perfect trial. *State v. Enno*, 119 Idaho 392, 408, 807 P.2d 610, 626 (1991); *State v. Estes*, 111 Idaho 423, 725 P.2d 128, 133 (1986). After this curative instruction was given to the jury, Jones was permitted to continue his closing argument, and the district court informed him that he could start over at the beginning. Jones's closing argument then continued for what is over eighteen pages of transcript. During the remainder of Jones's closing argument, he again referenced "proof beyond a reasonable doubt" and concluded that he "is not guilty of battery and he is certainly not guilty of aggravated battery. And I ask you to come back with not guilty." We conclude that the district court's curative instruction was not an impermissible comment on the evidence and did not deprive Jones of a fair trial.

B. Cumulative Error

Jones argues that the cumulative effect of twelve alleged errors deprived him of a fair trial. The cumulative error section of Jones's appellate brief begins with an enumerated list of the alleged errors--each stated briefly in one sentence without argument or authority. However, the body of the brief does contain argument on some of those enumerated alleged errors. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho

259, 263, 923 P.2d 966, 970 (1996). Therefore, we will only address the alleged errors that Jones has supported with argument and authority.

The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's right to due process. *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The presence of errors alone, however, does not require the reversal of a conviction because, under due process, a defendant is entitled to a fair trial, not an error-free trial. *Id.*

1. Cutlip's police statement

Jones asserts the district court erred by allowing Cutlip to read at trial a portion of his written statement given to the police. The state responds that Jones has not preserved this issue for appeal and the district court's decision to allow Cutlip to read the statement into the record was proper.

During cross-examination, Cutlip testified that he did not recall anyone saying anything to him before he was hit. Jones then impeached Cutlip's testimony by having Cutlip read from the police report he completed the day of the attack. Jones's impeachment of Cutlip with Cutlip's police report occurred as follows:

> Q. If I could direct your attention to that statement--I'm going to have to approach again, I apologize. Start here. I got there--would you read that out loud, please?
> A. When I got there I went up to Mandy and told her things are going to be different. [Jones] interrupted me telling me--I can't even read my own handwriting.
> Q. Does that say to leave?
> A. Telling me to leave.
> Q. Okay. Would you keep going?
> A. I told him this didn't concern him. It concerned my kids and ex-wife.
> Q. And?
> A. And I said you are not the father so stay out of it. I turned back to Mandy and tried to tell her again.
> Q. Okay, that's enough there. So you did have a discussion with [Jones]?
> A. Apparently so.

During re-direct examination, the state also used Cutlip's police report. The state attempted to have Cutlip read the remainder of the police report, but Jones objected and the following exchange occurred:

> [STATE]: You already have that statement still in front of you. You were reading or asked to read a portion of that, and I would ask you to read the rest of that.
> [DEFENSE COUNSEL]: Your Honor, I'll object it's not in evidence.
> THE COURT: Well, I think [the state is] entitled to put it in context. You may respond.

The district court overruled Jones's objection, and Cutlip was allowed to read the remainder of the police report.

On appeal, Jones claims that "the reading of the statement into the record is the improper admission of hearsay: the statement is an out of court [sic] statement for which no exception exits." The state responds that Jones's objection at trial--that the report was not in evidence--did not preserve his claim on appeal that the testimony was hearsay.

For an objection to be preserved for appellate review, the specific ground for the objection must be clearly stated. I.R.E. 103(a)(1); *State v. Norton*, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000); *State v. Gleason*, 130 Idaho 586, 592, 944 P.2d 721, 727 (Ct. App. 1997). Objecting to the admission of evidence on one basis does not preserve a separate and different basis for exclusion of the evidence. *State v. Higgins*, 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); *Norton*, 134 Idaho at 880, 11 P.3d at 499.

In this case, Jones objected on the basis that Cutlip's statement to the police was not in evidence. On appeal, Jones argues that the district court's decision to allow the testimony was improper because the testimony was hearsay. We agree with the state's argument that, by failing to object on the grounds of hearsay at trial, Jones has failed to preserve this argument for appeal. Because Jones has not preserved this issue for appeal, we decline to find error that would contribute to the cumulative error doctrine.

2. Cutlip's character

Jones argues that the district court improperly precluded him from introducing testimony related to three incidents that would have demonstrated to the jury what Jones knew about Cutlip's violent tendencies and why Jones reasonably feared Cutlip. *See State v. Hernandez*, 133 Idaho 576, 583-84, 990 P.2d 742, 749-50 (Ct. App. 1999) (noting that, when a defendant claims self-defense or defense of others, he or she may introduce evidence to demonstrate that the defendant reasonably feared the victim and reasonably believed that the force used was necessary to repel the victim's attack). In the first instance, Jones argues that Mandy was

precluded from testifying about why she told Jones she wanted a home where she had neighbors to help watch out for her and protect her. The state responds that this argument is belied by the record.

After describing an incident in which Cutlip was angry and displayed a shotgun, Mandy testified as follows:

> Q. Did you tell--was there anything else that day--that happened that day that caused you to fear for your own well-being that you had told [Jones] about?
> A. Well, up to that point I had also--I had already asked [Jones]--both [Jones] and my other neighbor to watch and make sure that there was nobody coming around the house at night; that there were no--I had already asked them to keep an eye on the house and to help me watch. And then--
> Q. Did you tell them why you wanted them to watch?
> A. Yes.
> Q. What was that reason?
> A. I explained that I was afraid that [Cutlip] was going to hurt me.

Although Jones references another portion of Mandy's testimony where she was precluded from testifying about why she told Jones she wanted a home with neighbors who would watch out for her, the district court sustained an objection to that testimony because Jones had not "established a time."

Jones's argument that he was precluded from introducing testimony about what Mandy told him about why she wanted a home with neighbors who would watch out for her is belied by the record and without merit. Therefore, this claim does not contribute to the doctrine of cumulative error.

Next, Jones claims that Mandy was precluded from testifying about an incident she related to Jones where Cutlip confronted an individual at the individual's job site. However, Jones concedes that he was later allowed to testify about this incident. The state counters that Jones is precluded from raising this issue on appeal because he invited the district court to err.

During Mandy's testimony, Jones tried to elicit testimony concerning an altercation between Cutlip and an individual at his job site. The state objected and the objection was sustained. Jones argued that he should be allowed to introduce the testimony because it is "a defense of others case and [Jones's] mind-set is absolutely relevant." The district court responded that it thought Jones's mind-set had already been established. However, the district court allowed Jones to proffer what Mandy's testimony regarding the incident would have been. Jones and the district court had the following discussion:

[DEFENSE COUNSEL]: She's going to talk about how [Cutlip] got in [the individual's] face, accused him of sleeping with Mandy and threatened him for being around Mandy and told very similarly to the way he threatened [Jones] in May. Perhaps it would be better to have that come directly from [Jones] according to what he knew.
THE COURT: You're welcome to have him--[Jones] testify to his state of mind.
[DEFENSE COUNSEL]: Then we'll do it that way.

The doctrine of invited error applies to estop a party from asserting an error when his or her own conduct induces the commission of the error. *State v. Atkinson*, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct. App. 1993). One may not complain of errors one has consented to or acquiesced in. *State v. Caudill*, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985); *State v. Lee*, 131 Idaho 600, 605, 961 P.2d 1203, 1208 (Ct. App. 1998). In short, invited errors are not reversible. *State v. Gittins*, 129 Idaho 54, 58, 921 P.2d 754, 758 (Ct. App. 1996). This doctrine applies to sentencing decisions as well as rulings made during trial. *State v. Griffith*, 110 Idaho 613, 614, 716 P.2d 1385, 1386 (Ct. App. 1986).

In this case, the record reveals that, although the district court made an initial ruling on whether Mandy would be allowed to offer the testimony, it continued to entertain argument from Jones. Therefore, when defense counsel decided to have Jones testify about the incident, he encouraged the district court to continue sustaining the objection. In addition, Jones testified regarding this incident on direct examination. We conclude that, based on the doctrine of invited error and because Jones was allowed to testify regarding the incident, this alleged error is without merit and does not contribute to the doctrine of cumulative error.

Finally, Jones argues the district court improperly prohibited him from testifying about a fight between his brother and Cutlip that occurred sixteen years prior to the incident in this case. The state responds that "the trial court's decision that the jury should not have been told about an incident that Jones 'knew' about, and that occurred sixteen years earlier is, on its face, unassailable." The district court precluded the testimony about the fight between Jones's brother and Cutlip that occurred sixteen years earlier because the incident "goes back too far." Jones has not provided authority demonstrating that the incident from sixteen years earlier was relevant. Therefore, we decline to find error in the district court's ruling.

As asserted by the state, there was no shortage of evidence produced at trial to demonstrate that Jones was aware of Cutlip's alleged violent tendencies. Jones has not

demonstrated that the district court's decisions disallowing testimony regarding what Jones knew about Cutlip's character were erroneous so as to contribute to the doctrine of cumulative error.

3. Incorrect statement of the law

Jones asserts that the district court erred by allowing the state to argue an incorrect statement of the law. The state contends that, even if the statement of the law was incorrect, it was of no consequence in Jones's case.

During the state's rebuttal closing argument, the prosecutor commented:

> [Defense counsel] argued that a [bar] employee told [Cutlip] to leave and at that point he was a trespasser and therefore Mr. Jones was justified in his beating of [Cutlip]. The law doesn't say it's okay to beat somebody to get them off your property. You can only beat them in defense of another.

At that point in the argument, Jones objected on the basis of "an incorrect statement of the law." The district court overruled the objection.

A party about to be injured may lawfully resist the commission of a public offense. I.C. § 19-201. Idaho Code Section 19-202 indicates that, to prevent an illegal attempt by force to take or injure property, the person who lawfully possesses the property may use resistance sufficient to prevent the offense from occurring. Because the defense of property is a valid affirmative defense, we agree with Jones's contention that the prosecutor argued an incorrect statement of the law and the district erred in overruling Jones's objection.

However, error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Poland*, 116 Idaho 34, 37, 773 P.2d 651, 654 (Ct. App. 1989). An error is harmless if the appellate court is able to say, beyond a reasonable doubt, that the jury would have reached the same result absent the error. *State v. Boman*, 123 Idaho 947, 950-51, 854 P.2d 290, 293-94 (Ct. App. 1993).

In this case, Jones's theory of defense was that he hit Cutlip to protect Mandy and her child. The jury instructions contained an instruction regarding "defense of another." Jones's argument centered on the defense of others, and Jones even stated that this is "a defense of others case." The state asserted during its closing argument that Jones had argued he was justified in his actions because Cutlip was trespassing. However, contrary to that assertion, a review of the transcript does not disclose an argument based on the defense of property being offered by Jones.

Jones's only argument throughout his trial was that his actions were legally justified based on his defense of Mandy and her child. Therefore, even though the state's characterization of the law of the defense of property was incorrect, we conclude that the erroneous statement of law could have had no impact on the jury's decision that Jones's actions were not justified based on a defense of others.

4. Improper questioning

Jones claims that the district court granted the state great leeway in its questioning and improperly allowed the state to use leading questions on direct examination and improperly allowed speculation and hearsay testimony. The state contends that Jones's claims regarding improper leeway afforded the state during questioning fail because they lack argument or authority, they were not preserved for appeal with a timely objection, or they are *de minimus*.

Jones asserts that the district court erred in allowing Cutlip to testify in violation of I.R.E. 602 (requirement of personal knowledge) and I.R.E. 611(c) (leading questions) in the following exchange:

> Q. And as far as when you came into the bar area you said you fell to the floor somehow?
> A. Correct.
> Q. But you couldn't remember the exact details of that?
> A. Correct?
> Q. Could it have been with the assistance of someone?
> A. It could have been.
> [DEFENSE COUNSEL]: Objection, leading.
> THE COURT: I'll overrule that.
> [DEFENSE COUNSEL]: I'm sorry, I could not hear the answer, Your Honor.
> THE COURT: He said it could have been.
> Q. Now you indicated yesterday and you responded again today that you didn't recall saying anything to someone when you went into the bar or being spoken to when you went into the bar?
> A. Correct.
> Q. Excuse me, the coffee shop, keep these separate. But is it possible that you could have spoken?
> [DEFENSE COUNSEL]: Objection, calls for speculation.
> THE COURT: Overruled. You may answer.
> A. It is possible.

The trial court has broad discretion in determining the admissibility of testimonial evidence. *State v. Smith*, 117 Idaho 225, 232, 786 P.2d 1127, 1134 (1990). A decision to admit or deny such evidence will not be disturbed on appeal absent a clear showing of abuse of that

discretion. *Id.* We conclude Jones has failed to provide a clear showing that the district court abused its discretion in this regard.

Next, Jones asserts that, during re-direct examination, the district court allowed Cutlip to offer improper hearsay testimony that was beyond the scope of cross-examination. Jones presents this claim of error in two sentences with a citation to the transcript. Although Jones did object to the testimony as "beyond the scope," there was no hearsay objection. Again, we conclude Jones failed to provide a clear showing that the district court abused its discretion and failed to support this claim with argument or authority. *See Zichko*, 129 Idaho at 263, 923 P.2d at 970 (holding that a party waives an issue on appeal if either authority or argument is lacking).

Finally, Jones contends the district court allowed the state to elicit testimony from Cutlip that went beyond the scope of rebuttal testimony and was irrelevant hearsay. One citation provided by Jones includes the district court's limiting instruction that the hearsay evidence offered by Cutlip was not being offered for the truth of the matter asserted but was offered, instead, to demonstrate Cutlip's understanding of the situation. Jones further contends that the district court's leeway afforded the state stands in stark contrast to the tight reign imposed upon his witnesses. To support this allegation, Jones cites to testimony offered by Mandy in which the district court sustained an objection to her testimony based on characterization. We conclude that Jones has not provided a clear showing of an abuse of discretion in the district court's evidentiary decisions; that Jones lacks proper argument and authority in support of his claims of error; and that any error is *de minimus* and we cannot conclude it impacted the jury's findings of guilt. *See* I.C.R. 52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.") Therefore, we will not consider the cumulative effect of these alleged errors.

In conclusion, Jones has only shown the district court erred with regard to its ruling on the state's incorrect description of the law. Even assuming that the district court's decisions on certain evidentiary issues were error, the cumulative effect of these errors is harmless. Jones admitted he punched Cutlip in the face. The only issue before the jury was whether the force used by Jones was reasonable. Jones was allowed to produce substantial evidence regarding what he knew about Cutlip and Cutlip's allegedly violent character. Therefore, because we are able to say, beyond a reasonable doubt, that the jury would have reached the same result absent

the cumulative effect of these alleged errors, we conclude that the cumulative effect of these errors was harmless and did not deprive Jones of his right to due process.

C. Motion to Continue

Jones asserts that the late disclosure of the presentence investigation report (PSI) prejudiced him at sentencing. Although not phrased as such, Jones's argument is essentially that the district court abused its discretion in failing to grant his motion for a continuance.[2] The state counters that Jones has failed to demonstrate his substantial rights were prejudiced.

The decision to grant a motion for a continuance rests within the sound discretion of the trial court. *State v. Ransom*, 124 Idaho 703, 706, 864 P.2d 149, 152 (1993). When a trial court's discretionary decision in a criminal case is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). Generally, it has been held that unless an appellant shows that his or her substantial rights have been prejudiced by reason of a denial of his or her motion for continuance, appellate courts can only conclude that there was no abuse of discretion. *State v. Cagle*, 126 Idaho 794, 797, 891 P.2d 1054, 1057 (Ct. App. 1995).

At the beginning of the sentencing hearing, Jones asserted:

> [DEFENSE COUNSEL]: Just--I want to put a general objection on the record to proceeding with the sentencing today given the lateness of the disclosure of the PSI. I was supposed to have it on the 19th. It came to me as I was leaving town last Thursday [the 22nd]. I got back at 5:30 on Monday morning. I was finally able to meet with Mr. Jones at 6:00 Monday night. I spent as much time as my schedule would allow to spend on it yesterday, but I'm not prepared fully to proceed today. I've not been able to interview the witnesses. There are a number of other witnesses I would have had here today had I had time to sufficiently prepare. And so I have a real strong objection to proceeding today. I understand your schedule and your determination to proceed forward, but I want my objection clear that this--I have been short-changed on the time, and it is to my client's detriment, and I'm really unhappy about that.

---

[2] Jones has included the late disclosure of the PSI in his all-inclusive cumulative error argument section of his brief. However, cumulative error deals with the due process right to a fair trial. *See, e.g., State v. Field*, 144 Idaho 559, 572-73, 165 P.3d 273, 286-87 (2007). Therefore, we will address Jones's argument as a denial of a motion for a continuance.

At the sentencing hearing, Jones called three witnesses: Mandy, Jones's boss, and Jones's neighbor. Although defense counsel indicated at the sentencing hearing that he would have interviewed and called other witnesses, Jones did not identify those witnesses at the hearing nor has he done so on appeal. Furthermore, presumably Jones would have been able to identify favorable witnesses for his attorney to call at sentencing without the aid of the PSI. Jones has not demonstrated that his substantial rights have been prejudiced by reason of a denial of his motion for a continuance.

III.
CONCLUSION

The district court did not err in precluding defense counsel from arguing the *Holder* principle, and the district court's curative instruction was not an impermissible comment on the evidence. Jones has shown no error that denied him a fair trial. We also conclude beyond a reasonable doubt that any cumulative effect of the errors alleged by Jones was harmless. Finally, Jones has not demonstrated that his substantial rights were prejudiced in his case. Jones's judgment of conviction for aggravated battery is affirmed.

Chief Judge GUTIERREZ, **CONCURS.**

Judge LANSING, **CONCURRING IN THE RESULT**

I concur in affirming Jones's judgment of conviction, but depart to some extent from the majority in the analysis of some of Jones's claims of error.

First, I disagree with Section II(A) of the majority opinion concerning defense counsel's closing argument. In my view, there had been no improper argument at the point where the prosecutor objected, and therefore the objection should have been overruled. Defense counsel was saying, "Anytime there is evidence that can be thought of in more than one way, anytime you look at this and say I think it was that way, if there is an explanation for that evidence that would lead you to a not guilty . . . ." If defense counsel had completed that sentence with something like, "you should find reasonable doubt," then it would have been permissible argument concerning the way the jury should view the evidence. Thus, the prosecutor's objection was premature, and it should have been overruled. On this particular error, however, there seems to be little basis for Jones to claim prejudice, for later in arguing against the State's objection, defense counsel made it clear that he wanted to complete the sentence by essentially

giving the jury a *Holder* instruction--telling them that if there is an explanation of the evidence consistent with the defendant's innocence, they *must* find him not guilty. That would have been an incorrect statement of the law. It would have been improper because in *State v. Humpherys*, 134 Idaho 657, 8 P.3d 652 (2000), the Idaho Supreme Court did not merely conclude that *Holder* instructions do not *have to be* given upon a defendant's request; it implicitly held that a *Holder* instruction is no longer a correct statement of the law. Moreover, as the majority points out, even if the *Holder* rule were still in effect, it would have no application here because it applies only to cases based on circumstantial evidence, whereas the State's case against Jones was predicated on direct eyewitness testimony. Therefore, the prosecutor's premature objection, sustained by the district court, merely prevented defense counsel from making an improper argument in the first place.

A further problem was created, however, by the district court's instruction to the jury where the court said: "I'm going to ask you to disregard [defense counsel's] statements that it could go one way or the other, that you had--that you should find not guilty." That statement literally tells jurors to disregard the defense attorney's argument that the evidence could be viewed to favor either the State or the defense and to disregard his argument that the jury should find the defendant not guilty. At best, it must have been confusing to jurors when the judge made the statement. Nevertheless, considering the entirety of the closing arguments, I see no reasonable possibility that this error could have misled the jury. After that erroneous instruction was given, defense counsel continued his closing argument over a long period, carefully reviewing the trial evidence and explaining to the jury the defense theory as to why Jones should be found not guilty. The jury was not instructed to disregard any of this subsequent argument and therefore was able to consider the defense position in its entirety.

I also disagree with the analysis in Section II(B)(3) of the majority opinion concerning the prosecutor's rebuttal closing argument. The prosecutor stated that "the law doesn't say it's okay to beat somebody to get them off your property." In my view, the district court correctly overruled Jones's objection that this was "an incorrect statement of the law." Even though Idaho statutory law allows one to lawfully resist the commission of a public offense, even if the individual is not the victim of the offense, I.C. § 19-201, that does not mean that the individual would be justified in "beating" someone to prevent a simple trespass on real property. The law authorizes only "resistance sufficient to prevent the offense." I.C. § 19-203. *See also State v.*

McNeil, 141 Idaho 383, 109 P.3d 1125 (Ct. App. 2005). In this case, the State could properly argue that Jones's beating of Eric Cutlip far exceeded the force that was necessary or reasonable to terminate Cutlip's trespass on property after he was instructed to leave. Accordingly, I see no error in the district court's rejection of Jones's objection to this part of the prosecutor's argument.

Although I arrive at the decision through a slightly different path, I join in the majority's determination that the judgment of conviction should be affirmed.